

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

Settlement Facility Dow Corning Trust.

Case No. 00-00005
Honorable Denise Page Hood

**DOW CORNING'S MOTION TO STAY THE COURT'S RULINGS ON THE
DISABILITY LEVEL A AND TISSUE EXPANDER ISSUES PENDING APPEAL**

Dow Corning Corporation respectfully requests that the Court stay its Orders Regarding the Disability Level A and Tissue Expander issues (hereinafter "Rulings") pending appeal to the United States Court of Appeals for the Sixth Circuit. Implementation of the Rulings will significantly impact not only Dow Corning and the Trust, but also the majority of Trust claimants who risk being adversely and permanently affected if the Rulings are not stayed. All of these constituencies will be irreparably harmed in the absence of a stay because, as a practical matter, sums that are paid out of the Trust will never be recovered if either or both of the Rulings are reversed. Absent a stay, there is a significant risk that the majority of claimants will suffer a reduction in Premium Payments because the finite pool of Trust assets currently available to pay the tens of millions of dollars of Premium Payments will be depleted by new payments to Disability A and Tissue Expander claimants. Likewise, Dow Corning will be irreparably harmed because every dollar paid by the Trust to claimants that may ultimately prove ineligible, should Dow Corning prevail on appeal, is a dollar out of Dow Corning's pocket. As demonstrated by the accompanying affidavit of Deborah Greenspan, that total runs into the tens of millions of dollars. In contrast, the minority of claimants who may actually benefit from the Rulings will not be significantly harmed by a temporary stay pending the Sixth Circuit's final resolution of

these matters given that these issues have already been the subject of litigation for several years and sufficient funds will be preserved in the Trust during the pendency of the appeal. Accordingly, a stay of the Court's rulings is necessary to prevent irreparable harm to Dow Corning, claimants, and the public interest.

ARGUMENT

Federal Rule of Appellate Procedure 8(a)(1)(A) authorizes this Court to stay the Rulings pending appeal. FRAP 8(a)(1)(A). The Sixth Circuit has identified four factors to consider in determining whether such a stay is warranted: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (granting stay pending appeal); *Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001) (reversing district court's denial of stay pending appeal). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Michigan Coalition*, 945 F.2d at 153.

Here, each factor strongly supports a stay pending the Sixth Circuit's resolution of the appeal. Both the Sixth Circuit and this Court have recognized that stays pending appeal are appropriate in circumstances such as this, where the Court has directed a party (here, the SF-DCT Claims Administrator) to take or refrain from taking certain action that may lead to significant harm that is difficult to remedy in the event the appeal is successful. *See, e.g., Stephens v. Childers*, 1994 WL 761234 (6th Cir. Dec. 13, 1994) (granting stay of order that would have cost Kentucky an additional \$50 million in Medicaid payments to doctors);

Michigan Coalition, 945 F.2d at 156 (granting motion to stay permanent injunction entered under the federal Low-Level Radioactive Waste Policy Act pending appeal); *Grutter*, 247 F.3d at 633 (reversing district court denial of stay of injunction pending appeal); *Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000) (granting stay of order directing Ohio Secretary of State to take action related to 2000 Presidential election); *Simon Prop. Group, Inc. v. Taubman Centers, Inc.*, 262 F. Supp. 2d 794, 799-800 (E.D. Mich. 2003) (staying order limiting rights of party in corporate takeover bid pending appeal).

First, there are serious questions going to the merits that will be addressed on appeal. Under this first factor, a party need not show “a high probability of success on the merits.” *Michigan Coalition*, 945 F.2d at 153-54. Rather, the existence of “serious questions going to the merits” is enough. *Id.* Such “serious questions” may be presented where, among other things, the issues in the appeal are “complex and difficult” or where another court has reached a conflicting conclusion. *Historic Preservation Guild of Bay View v. Burnley*, 896 F.2d 985, 992 (6th Cir. 1989); *W. Tenn. Chapter of Associated Builders & Contractors v. City of Memphis*, 138 F. Supp. 2d 1015, 1027 (W.D. Tenn. 2000). The “probability of success” supporting a stay pending appeal is “inversely proportional to the amount of irreparable injury” with which the appealing party is threatened. *Michigan Coalition*, 945 F.2d at 153-54; *see also Wash. Metro. Area Tran. Comm’n v. Holiday Tours, Inc.*, 559 F.2d at 843-44 (D.C. Cir. 1977) (rejecting view that “a 50% plus probability” is required for a stay and holding that the “degree of possibility of success required” turns on the other factors supporting a stay); *Simon Prop. Group, Inc.*, 262 F. Supp. 2d at 798.

Dow Corning’s arguments on the merits are set forth in its prior briefing, and it will not repeat them here. However, the issues that are the subject of the Court’s orders have been

heavily contested, with both sides filing numerous motions that have been litigated over several years. *See Burnley*, 896 F.2d at 992 (granting stay where issues were “complex and difficult”). Moreover, as this Court recognized in its decision on the Disability A issue, there is a conflict of authority given that the Court has reached a different conclusion from that of Judge Pointer, who presided over the MDL proceedings. *See City of Memphis*, 138 F. Supp. 2d at 1027 (granting stay where other courts had reached opposite conclusion). Finally, as discussed below, both Dow Corning and the majority of claimants face significant and irreparable injury in the absence of a stay. Accordingly, the significant issues addressed in the Rulings warrant a stay under the circumstances present here. *See Michigan Coalition*, 945 F.2d at 153-54.

Second, Dow Corning and the Trust face immediate and irreparable harm if a stay is not granted because the Court’s rulings would require them to make millions of dollars in payments that they could not recover in the event that they prevail before the Sixth Circuit. *See Michigan Coalition*, 945 F.2d at 154. The federal courts have consistently recognized that such “[d]ifficulty in collecting a damage judgment may support a claim of irreparable injury.” *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). Thus, for example, in *Chambers v. Ohio Dept. of Human Services* the Sixth Circuit reversed a district court’s denial of a stay pending appeal where the district court ordered a change in Ohio’s Medicaid payment policies that would have required the State to make hundreds of millions of dollars in additional payments. 145 F.3d 793, 795-96 (6th Cir. 1998). Likewise, in *Stephens v. Childers*, it stayed an injunction that would have required the State of Kentucky to make \$50 million in additional Medicaid reimbursements to doctors. 1994 WL 761234, at *1 (6th Cir. Dec. 13, 1994).

This case mirrors *Chambers* and *Stephens*, in which a change in payment rules would have caused defendants to make millions of dollars of new payments that could not, as a practical matter, be recovered once made. Just as it was, as a practical matter, impossible for Ohio and Kentucky to recover millions of dollars spent on thousands of Medicaid recipients in a myriad of individual suits, it would be nearly impossible for Dow Corning to recover such sums from the thousands of claimants who may invoke the Court's rulings in seeking additional payments. Greenspan Aff. ¶¶ 21-25. Dow Corning or the Trust would be forced to locate, and then attempt to recover funds from, thousands of individual claimants who received overpayments – an unseemly and virtually impossible task. *See id.* ¶¶ 23, 25. In many cases, claimants will have already spent any additional sums received from the Trust, thereby rendering any right of recovery meaningless. *Id.* ¶ 24. *See also, e.g., In re Diet Drugs*, 236 F. Supp. 2d 445, 463 (E.D. Pa. 2002) (“Realism dictates that money once paid to improper recipients is unlikely ever to be recouped.”).

Moreover, the harm to Dow Corning and the Trust would be substantial. The Court's ruling on the Disability Level A issue may result in tens of millions of dollars in additional payments to a minority of the current claimants as well as additional payments to claimants whose claims have not yet been finalized. Greenspan Aff. ¶¶ 13-14, 19-20. The Claims Administrator for the Trust has reported to Dow Corning that there may be in excess of 2,000 individuals whose claims have already been processed and paid and who could become eligible to receive additional payments as a result of the Court's ruling. *Id.* ¶ 10. The difference in the amount payable, per individual Domestic Claimant, between a Level A finding of disability and a Level B finding of disability is \$30,000. *Id.* ¶ 12. The difference in the amount payable, per individual Domestic Claimant between a Level A finding of disability and a Level C finding of

disability is \$40,000. *Id.* Likewise, the Trust has indicated that approximately 600 claimants who apparently received a tissue expander at one time have already filed claims under the breast implant settlement program, and that these claims may result in millions of dollars in additional payments. *Id.* ¶¶ 17-19. Nor do such sums fully reflect the effect of the Court's rulings going forward. The Court's rulings may lead other individuals who have not yet filed disease claims to file additional claims once they learn that the Court has authorized payment for tissue expanders and has permitted a more relaxed standard for payment of Disability Level A claims than the Trust had previously applied. *Id.* ¶¶ 11, 20. In the event that Dow Corning is successful on appeal, it will be impossible to recover any payments the Sixth Circuit deems unwarranted – essentially negating Dow Corning's appeal right.

Third, in contrast to the immediate and irreparable harm faced by Dow Corning and the Trust, the minority of claimants who benefit from the Court's rulings face no irreparable harm if a stay is granted. The additional monetary compensation that they seek will be preserved by the Trust during the pendency of the appeal and will be available to them in the event that they prevail on appeal. Under such circumstances, where plaintiffs seek immediate access to money that "is already held in escrow," the threat of harm to the plaintiff is "slight", thereby supporting the implementation of a stay. *S&M Brands Inc. v. Summers*, 2006 WL 1804606, at *3 (M.D. Tenn. June 28, 2006). Moreover, any additional delay in payment during the pendency of the appeal will be minimal in the context of this litigation, which has been ongoing for several years. Indeed, the affected claimants have already received a payment reflecting the disability level assigned by the Trust. A stay will merely preserve the status quo under which the parties have been operating since the Plan went effective over five years ago. *Cf. Simmons v. Stephen*, 2009 WL 1013497, at *1 (W.D. Mich. Apr. 15, 2009) (noting that "[t]ypically a stay is entered in

order to preserve the status quo”) (citing *Reed v. Rhodes*, 472 F. Supp. 603, 605 (W.D. Mich. 1979)).

Fourth, and perhaps most compellingly, there is a strong public interest in granting the stay. Not only will Dow Corning and the Trust be irreparably harmed if a stay is not entered, but so will the majority of claimants who do not benefit from the Court’s ruling (including Disability Level A claimants whose claims are not in dispute). As the Court is aware, under the Plan thousands of claimants (including those who have received Rupture payments and those who have received Disease payments at any level) are eligible to receive Premium Payments provided that there are sufficient assets to make such payments after assuring payment of Base Payments and other obligations of the Trust. Greenspan Aff. ¶¶ 26-29. Based on the most recent report of claims paid by the Trust, Dow Corning has calculated that such claims amount to approximately \$200 million at this time. *Id.* ¶ 28.

If the Court does not enter a stay, the Trust will be forced to make tens of millions of dollars in payments to a minority of claimants that can never be recovered. Moreover, the Rulings may lead other individuals to file new claims while the appeal is pending. Such payments will deplete the finite and capped pool of Trust assets available to make Premium Payments to the other claimants, and indeed could threaten the Trust’s ability to make full payment on the Base Payments owed to future claimants. Greenspan Aff. ¶ 29. The failure to enter a stay will thus cause significant and irreparable harm to current and future claimants, whose compensation may be reduced as a result of the Court’s rulings. *Id.* The public interest favors the “preserv[ation] of the integrity” of the Trust by entering a temporary stay pending the Sixth Circuit’s ruling to avoid “seriously increas[ing] the danger that eligible persons would not be compensated under the Settlement Agreement.” *See In re Diet Drugs*, 236 F. Supp. 2d at 463.

See also Stenberg v. Cheker Oil Co., 573 F.2d 921, 924 (6th Cir. 1978) (granting stay where available funds could be “wiped out’ long before a final decision,” thereby rendering a later judgment that vindicates the rights of future claimants “meaningless”); *Summers*, 2006 WL 1804606, at *3 (noting the “public interest in keeping the escrow accounts fully funded for payment of future health-related claims”).

CONCLUSION

For the foregoing reasons, Dow Corning respectfully requests that the Court stay its Rulings on the Disability Level A and Tissue Expander issues pending appeal.

June 19, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **June 19, 2009** June 19, 2009, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel of record.

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